Filed 3/18/09 Lewitt v. Lavin CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

TODD LEWITT, Plaintiff and Appellant, v. MICHAEL LAVIN et al., Defendants and Respondents.	B196582 (Los Angeles County Super. Ct. No. YC051526)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bob T. Hight, Judge. Affirmed.

Goldwasser & Glave and Corey William Glave, for Plaintiff and Appellant.

Liebert, Cassidy & Whitmore, Mark H. Meyerhoff and Connie M. Chuang, for Defendants and Respondents.

Todd Lewitt appeals from the summary judgment entered for defendants the City of Hermosa Beach and the Hermosa Beach Police Department in an action alleging violations of the statutory due process rights guaranteed to police officers in misconduct investigations. We affirm.

FACTS AND PROCEDURAL HISTORY

Todd Lewitt was one of several Hermosa Beach police officers involved in the arrest of three persons for public intoxication and resisting arrest. Those persons (the citizens) filed complaints with the Hermosa Beach Police Department (the department) alleging that they were the victims of false arrest and that Lewitt and the other officers were rude, discourteous, and used excessive force. They also claimed Lewitt had destroyed certain evidence. A department internal affairs investigation was launched, Lewitt and the other officers were interrogated, and, in December 2004, the department issued a report determining that the citizen complaints were either unfounded or that the arresting officers' conduct had been within policy. As a result, Lewitt was never disciplined in connection with the May 2004 arrests. An officer testified that he saw Lewitt review the file from that investigation in December 2004. Lewitt also signed a form stating that he "acknowledged" that file.

The citizens were tried and acquitted on the underlying criminal charges in January 2005. In February 2005, the lawyer for two of them filed a citizen complaint with the department that criticized the 2004 investigation as a whitewash and accused Lewitt and the other officers of conspiring to falsely prosecute his clients, including perjuring themselves at trial. Shortly after, one of those two citizens filed a complaint alleging that Lewitt and other officers had been stalking and harassing her. Police Chief Michael Lavin hired outside investigator Daryl Wicker to investigate the new charges.

While the second investigation was pending, Lewitt and the other officers sued the City of Hermosa Beach and the department for violating their procedural due process rights under the Public Safety Officers Procedural Bill of Rights Act (Gov. Code,

§§ 3300-3313 (POBRA or the Act).)[1] These included the rights to: adequate notice of the charges and of the identity of those who would attend their interrogations; obtain copies of certain items in their personnel file; and respond to adverse comments in their personnel files. They also alleged that the second investigation violated POBRA's one-year limitations period because it was a re-opening of the first investigation.

Lewitt was interrogated by Wicker on August 22, 2005. On November 23, 2005, Wicker issued a report determining that Lewitt and the other officers had done nothing wrong. As a result, no discipline was imposed. The other officers then dismissed their cases.

The department brought a summary judgment motion, contending that it had afforded Lewitt his rights under POBRA. That motion was granted and Lewitt contends the trial court erred.

STANDARD OF REVIEW

Summary judgment is granted when a moving party establishes the right to the entry of judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) In reviewing an order granting summary judgment, we must assume the role of the trial court and redetermine the merits of the motion. In doing so, we must strictly scrutinize the moving party's papers. The declarations of the party opposing summary judgment, however, are liberally construed to determine the existence of triable issues of fact. All doubts as to whether any material, triable issues of fact exist are to be resolved in favor of the party opposing summary judgment. While the appellate court must review a summary judgment motion by the same standards as the trial court, it must independently determine as a matter of law the construction and effect of the facts presented. (*Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 562.)

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[1] Also named were Lavin and a police officer named Eckert. Both were later dismissed after the trial court granted their motion for judgment on the pleadings. Hereafter, when we refer to the department, we include the City of Hermosa Beach. All further undesignated section references are to the Government Code.

A defendant moving for summary judgment meets its burden of showing that there is no merit to a cause of action if that party has shown that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subds. (o)(2), (p)(2).) If the defendant does so, the burden shifts back to the plaintiff to show that a triable issue of fact exists as to that cause of action or defense. In doing so, the plaintiff cannot rely on the mere allegations or denial of her pleadings, "but, instead, shall set forth the specific facts showing that a triable issue of material fact exists, . . ." (Code Civ. Proc., § 437c, subd. (p)(2).) A triable issue of material fact exists "if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. [Fn. omitted.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.)

Our first task is to identify the issues framed by the pleadings. (*Lennar Northeast Partners v. Buice* (1996) 49 Cal.App.4th 1576, 1582.) The moving party need address only those theories actually pled and an opposition which raises new issues is no substitute for an amended pleading. (*Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, 1342.)

DISCUSSION

1. Relevant POBRA Provisions

Section 3303 describes the procedural rights of police officers when being interrogated.

We summarize the relevant subsections and related statutes:

- Subdivision (b) states that an officer must be informed ahead of time of the "rank, name, and command of the officer in charge of the interrogation, the interrogating officers, and all other persons to be present during the interrogation."

- Subdivision (c) states that the officer under investigation must be informed "of the nature of the investigation prior to any interrogation."
- Subdivision (g) states that the interrogation may be tape recorded. If so, the officer "shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. The . . . officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports or complaints made by investigators or other persons, except those which are deemed by the investigating agency to be confidential."
- Section 3304, subdivision (d) states that "no punitive action . . . shall be undertaken for any act, omission, or other allegation of misconduct if the investigation of the allegation is not completed within one year of the public agency's discovery . . . of the . . . misconduct."
- Section 3305 provides that comments adverse to a public safety officer's interests shall not be entered in his personnel file without the officer first having read and signed the document containing those comments. Section 3306 provides that an officer shall have 30 days to file a written response to any adverse comments entered in his personnel file.
- Section 3306.5, subdivisions (a) and (b) require employers to maintain copies of a public safety officer's personnel file and to make those files available for inspection upon request.

2. *Lewitt's Request to Review Certain Materials Was Properly Denied*

On May 31, 2005, Lewitt's lawyer sent a letter to the department contending that the second investigation was really a re-opening of the first investigation. Pursuant to section 3303, subdivision (g), the lawyer demanded that the department produce copies of items that included not just any reports and tape recorded interviews, but photographs, preliminary reports, raw notes, internal memos, e-mails, expert reports, daily patrol sheets, and many others. The department responded that the second investigation was

new and wholly distinct from the first. Under case authority interpreting section 3300, subdivision (g), the department had no duty to turn over items apart from reports, complaints, or interview transcriptions, a duty that did not arise until after Lewitt was interrogated. Because that interrogation had not yet occurred, the department said it had no current obligation to provide any documents under section 3300, subdivision (g). To the extent Lewitt wanted to view his personnel file and respond to any adverse comments, the request was granted. The department pointed out, however, that Lewitt had already been given that opportunity in connection with the first investigation.

Lewitt contends the second investigation was in large part a rehash of the first, meaning the department violated POBRA when it refused to turn over the documents and other materials specified in his lawyer's July 2005 letter. We disagree.

Lewitt does not dispute that the stalking and harassment charges were separate from and independent of the original May 2004 citizen complaint. We have no doubt that allegations concerning perjury at trial are also separate and distinct from allegations that Lewitt and the other officers had committed the acts of excessive force and false arrest asserted in the original 2004 citizen complaints. Citing to *Alameida v. State Personnel Bd.* (2004) 120 Cal.App.4th 46, 62, Lewitt contends the perjury charge was the same as the original charges because it was wholly derivative of them. *Alameida* involved disciplining an employee for lying about a sexual assault charge during his employer interview. Perjured trial testimony would be an independent offense, however, that is actionable on its own.

Lewitt points to certain evidence that suggests the allegations of the original investigation were at issue during the second investigation. This includes the admonition sheet he signed at the start of his interrogation, which lists as the nature of the investigation not just the 2005 perjury charge, but May 23, 2004, incidents of false arrest, false police report, assault, and destruction of evidence. While on its face this may seem to present a triable issue of fact concerning the true scope of the second investigation, closer examination of the record shows otherwise. When Lavin's and Wicker's deposition testimony is synthesized, they said that matters concerning the first

investigation necessarily overlapped with the issue of the perjury allegations and were included simply to alert Lewitt to that fact. This is confirmed by Wicker's report, which we believe is the clearest possible indication of the second investigation's true scope. In it, Wicker sets forth five allegations. The first two are limited in scope to February 2005 and allegations that Lewitt and the other officers colluded to charge, try, and convict the three complaining citizens, and perjured themselves at trial. The final three concern February and March 2005 incidents by Lewitt and other officers where they allegedly tried to harass one of the complainants. The report ends by addressing those five allegations and determining that they are unfounded or unwarranted. Although in between it includes some discussion about the events of the underlying May 2004 arrest, those appear to us as nothing more than background information necessary to Wicker's discussion of the perjury allegations.

In short, there are no triable issues of fact that support the second investigation was in any way a re-opening of the first investigation. Lewitt confines his appellate argument concerning his section 3300, subdivision (g) rights to the notion that the two investigations were one and the same. The failure of this argument defines the scope of Lewitt's POBRA discovery rights at the time of his lawyer's May 2005 letter. Tapes of his 2004 interrogation were available only if further proceedings were contemplated at that time or further interrogations were in fact scheduled. There is no evidence that further proceedings were contemplated in connection with the first investigation and it is undisputed that no further interrogations occurred in connection with that investigation. When the department denied that request in July 2005, Lewitt had not been interrogated in connection with the second investigation, so there was no tape or transcript to request or produce. As for the documents and other materials requested by the lawyer, Lewitt was limited to the reports and complaint only, and only after he was interrogated as part of the second investigation. (*Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1286-1287.) There is no evidence that Lewitt ever followed up on his lawyer's premature request and was then denied his rights under section 3300, subdivision (g). Accordingly, that claim must fail.

3. *The Second Investigation Was Timely*

Based on his mistaken belief that the second investigation was simply an extension of the first, Lewitt contends the City violated section 3304, subdivision (d) by re-opening the first investigation more than one year after discovery of the facts underlying the 2004 citizen complaint. He is wrong on two counts: First, because the second investigation was completely separate and distinct; and second because section 3304, subdivision (d) prohibits taking punitive action more than one year after discovering possible misconduct and no punitive action was taken against Lewitt. If no punitive action was taken, section 3304, subdivision (d) was not violated.

4. *Proper Notice Was Given As to Those Who Would Be Present During the Interrogation*

On August 10, 2005, the department sent Lewitt notice that Wicker would conduct Lewitt's interrogation. When Lewitt showed up for the interrogation, a Sergeant Wolcott was in the room. Wolcott read Lewitt his various rights, then left before Wicker questioned Lewitt about the new charges. Section 3303, subdivision (b) requires prior identification of all persons who will be present "during the interrogation." Because Wolcott did no more than advise Lewitt of his rights, then leave before questioning began, Wolcott was not "present during the interrogation" and the statute was not violated.

5. *Lewitt Received Adequate Notice of the Nature of the Investigation*

On July 25, 2005, the department sent Lewitt a letter stating he was under investigation based on the lawyer's complaint letter of February 2005, along with a complaint by one of the three citizen complainants based on events occurring around 11:30 p.m. on February 9, 2005. The citizen was identified by name. On July 28, 2005, Lavin sent Lewitt a letter that gave more detail about the investigation, referring to the lawyer's February 2005 letter and its "allegations of misconduct resulting from your

performance during the trial, including perjury, falsification of reports and conspiracy among other charges." Lewitt contends this was inadequate notice. We disagree. Section 3303, subdivision (c) requires nothing more than prior notice of the nature of the investigation. These two letters gave such notice.

Even if the details of the harassment charge were insufficient, a harmless error standard applies. (*Hinrichs v. County of Orange* (2005) 125 Cal.App.4th 921, 928.) Because Lewitt was cleared of any wrongdoing, any error in notification concerning that charge was necessarily harmless.

6. *There Are No Triable Fact Issues Showing a Violation of the Duty to Let Lewitt Inspect His Personnel File and Respond to Adverse Comments*

Lewitt contends the City violated his rights under sections 3305, 3306, and 3306.5 by failing to let him read any adverse comments before they were placed in his personnel file, respond to such comments within 30 days, or to inspect his file. The department's Captain Eckert said he witnessed Lewitt reviewing the file from the first investigation in December 2004. At the conclusion of the first investigation, Lewitt signed a document stating that he acknowledged the existence of that investigative file. Lavin testified the purpose of that form was to acknowledge that the officer had reviewed the file. At his deposition, Lewitt said only that he could not recall having reviewed his file at that time. His testimony is unresponsive and too speculative to raise a triable fact issue that he never saw the file from the first investigation. (See *Joseph E. Di Loreto, Inc. v. O'Neill* (1991) 1 Cal.App.4th 149, 150-151 [failure to recall does not logically contradict affirmative evidence].) He also could not recall whether he ever asked to review any of the documents from the first investigation. As for the second investigation, the department answered the letter from Lewitt's lawyer by agreeing to make his file available for inspection. There is no evidence that Lewitt ever followed up on that request. Based on this, there is no evidence that the department ever prevented Lewitt from inspecting his personnel file or making a response to any adverse comments therein.

DISPOSITION

For the reasons set forth above, the summary judgment is affirmed.

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RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

O'NEILL, J.*

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* Judge of the Ventura Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.